

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Texas Mutual Insurance Company, Petitioner,
v.
Paula Ledbetter, Representative of the Estate of Charles Wade
Ledbetter, et
al., Respondents.
No. 06-0814.

November 15, 2007.

Appearances:
Mary A. Keeney, Graves Dougherty Hearon & Moody, P.C., Austin, TX,
for petitioner.
Lance Hall, Attorney at Law, Sweetwater, TX, for respondents.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Dale
Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil
Johnson, and Don R. Willett, Supreme Court Justices.

CONTENTS

ORAL ARGUMENT OF MARY A. KEENEY ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF LANCE HALL ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF MARY A. KEENEY ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to
hear argument in 06-0814 Texas Mutual Insurance Company versus Paula
Ledbetter.

COURT ATTENDANT: May it please the Court. Miss Keeney will present
argument for the petitioner. Petitioner has reserved eight minutes for
rebuttal.

ORAL ARGUMENT OF MARY A. KEENEY ON BEHALF OF THE PETITIONER

MS. KEENEY: May it please the Court. I'm here today in behalf of
Texas Mutual. This appeal concerns the statutory subrogation rights of
worker's compensation carriers in the settlement funds, third parties
responsible for a covered employees death or injury. The legislator has
granted carriers the right to recover from those settlements with third
parties, not only the workers' compensation benefits that have already
been paid but also to get a statutory credit against future benefits
applied to those settlement proceeds. These are important statutory
rights designed to reduce the high cost of our workers' compensation
system. This case really deals with the procedural steps necessary to
ensure the protection of those rights and the, there was something of a
procedural mores in the trial court, so I'd like to go through some of

the facts just to give a context. In this case the employee was Charles Ledbetter, he was electrocuted while acting in the course and scope of his employment. Texas Mutual, the employer's insurer, began paying death benefits to his widow and his minor child. The plaintiffs here consist of, consisting of his widow, his minor child, his two adult children, and the estate, sued two non-employer defendants, Nelms Electric and Williams -

JUSTICE BRISTER: May I ask about the money that went to the estate, what -- do we know what happened to that after it went to the estate?

MS. KEENEY: Well, your Honor, the judgment and the settlement, and that's part of the record, it has the most complicated set of annuities and payments set up that I think I have ever seen. I'm not quite-- but some of it has been paid out, some of it is in the process of being paid out through the estate.

JUSTICE BRISTER: Most of it -- does it go to the wife and son?

MS. KEENEY: No, it also goes to the adult children and about half of it went to the lawyers, about 2.4 actually went into the estate, some of it was to go for the benefit of the minor child but it was up to the, up to Mrs. Ledbetter to decide how the payments were to be made. Unfortunately, Mrs. Ledbetter has, is now deceased. She died after the trial court's judgment was entered so, if the Court agrees with us on, on the issue we have regarding the nonsuit, we would need to substitute in her estate. We don't believe it's all been paid out but a substantial amount of it has been.

JUSTICE BRISTER: So she was trust-- she's trustee for some of the funds for the time?

MS. KEENEY: She was the administratrix of the estate. Yes.

JUSTICE WILLET: Does your right, does your right to subrogation depended at all on whether the money went directly to Ledbetter family members as opposed to the estate, or was it all the same -

MS. KEENEY: We have a six thousand dollar claim against the estate for funeral expenses and that's it. What-- and that's really what's critical here and is that our subrogation rights are limited to the rights, the recovery that should be allocated to the widow and to the minor child because those are the two people to whom Texas Mutual was paying benefits. We don't have any obligation to pay benefits to the adult children. We now pay the full amount of the benefit on behalf of the minor child. After Mrs. Ledbetter died there has been no guardian, we've not been informed of any guardian. We're just basically escrowing those proceeds at this point.

JUSTICE WILLET: But they've all been nonsuit.

MS. KEENEY: They have been nonsuited and that is, that is the problem that we see in this case.

JUSTICE HECHT: Is the six thousand dollars part of the twenty-seven thousand nine hundred forty-three?

MS. KEENEY: No, it's not, your Honor. That's all that the, the - almost twenty-eight thousand was that-- was the amount that had been paid as of the day of the trial. And that the -

JUSTICE JOHNSON: Don't you have a case pending right now?

MS. KEENEY: Pardon?

JUSTICE JOHNSON: Isn't there a case pending right now between the carrier-- the comp carrier and the defendants?

MS. KEENEY: Yes.

JUSTICE JOHNSON: Has anyone plead that you're barred by this settlement agreement from making recovery?

MS. KEENEY: I believe all the other litigation has been abated

pending the resolution of this appeal and -

JUSTICE JOHNSON: Could they plead that?

MS. KEENEY: Could they -

JUSTICE JOHNSON: How could this settlement bar your subrogation, your direct action against the defendants?

MS. KEENEY: How could-- against, against Nelms and Scotsman?

JUSTICE JOHNSON: Against the defendants responsible for the damages to the deceased. Your-- the statute puts you on the deceased's shoes and in the shoes of beneficiaries, correct?

MS. KEENEY: That's correct.

JUSTICE JOHNSON: That's the lawsuit you have pending at this time?

MS. KEENEY: That's a lawsuit that we have pending -

JUSTICE JOHNSON: How could anything that's taken place up to this point damage or harm your rights against the defendants?

MS. KEENEY: I think the judgment in this case, in the trial court did do precisely that -

JUSTICE JOHNSON: How?

MS. KEENEY: How?

JUSTICE JOHNSON: Can they plead you -- can they plead that against you? Is it a bar in anyway, a release of your rights in anyway?

MS. KEENEY: I believe that they adjudicated the rights of the, of Mrs. Ledbetter and of the minor child.

JUSTICE JOHNSON: But I'm talking about the carrier, that's what you represent.

MS. KEENEY: We stand in their shoes.

JUSTICE JOHNSON: Right.

MS. KEENEY: And if they have a judgment what we have left is a conversion claim against parties who received money out of that settlement.

JUSTICE JOHNSON: But let's, let's say you try your case against the defendants and the jury says they were negligent, they caused the death, a million dollars worth of damages. Doesn't that make you whole?

MS. KEENEY: If we can pursue that but I think what Nelms and Scotsman would raise is, that, is the bar of, of this judgment in this case.

JUSTICE JOHNSON: What I'm wondering is -- that's what I'm trying to ask.

MS. KEENEY: Yes. I think that does -

JUSTICE JOHNSON: Is there anything that bars your claim that the statute gives you can, can another-- can someone else bar your claim?

MS. KEENEY: If we stand in -- we have a right of subrogation and we stand in the shoes of Mrs. Ledbetter and the minor child. If they already reached settlement and a judgment that cuts off their rights, that constitutes a conversion of, of the funds that should have been allocated to us. We-- I, I think we'd have a problem going against Nelms and Scotsman under those circumstances.

JUSTICE BRISTER: But if use, if-- let me, let me try the same question. If there's a hospital lien and the tortfeasors give all the money to the plaintiff and the plaintiff's attorney and don't pay the hospital, then the tortfeasor gets to pay twice. That's what hospital liens do. They put you on notice to say, don't pay that money to them and if the tortfeasor files ahead and pays the money to him, then the tortfeasor gets to pay twice. Don't these people get to pay twice? They were on notice that you were claiming, you owned part of the plaintiff's course of action.

MS. KEENEY: Nelms and Scotsman may, may be subject to, to, a, a similar conversion claim.

JUSTICE BRISTER: I know, but what we're trying to get at is, is there any possible way they could escape that, because if there's any possible way they could escape that, then you're not harmed. If there's no possible way, if they're just going to have to pay twice, I mean are they bankrupt, there's, there no insurance left?

MS. KEENEY: I believe that we-- that there is adequate, adequate funds to retrieve this. What we are seeking here is a determination that the plaintiffs are not entitled to exit from this so that we can have adjudicated as to them our rights to continue to pay benefits because that is basically what has happened by allowing the plaintiffs here to take a nonsuit. We have not-- we will not be able to adjudicate as to the minor child and the Ledbetter estate, whether we were obligated to continue to pay benefits because they are the parties to whom we owe those benefits. We need an opportunity to adjudicate our rights and obligations as to them and that's why they should be required to remain as parties in this litigation. The, the other problem -

JUSTICE JOHNSON: If I-- let me interrupt you just a moment. You're, you're suing the defendants and if you get a judgment for million dollars, you've paid six thousand and twenty-seven thousand and then you have an obligation for future payments. Let's say your obligation for future payments is a hundred thousand dollars, so you're, you got a judgment for eight hundred some odd thousand dollars excess of your liability to the, to the, under the comp law. What happens to the eight hundred thousand dollars?

MS. KEENEY: We would not be entitled to that -

JUSTICE JOHNSON: Sure you wouldn't --

MS. KEENEY: That would be -

JUSTICE JOHNSON: -- but the defendants now have bought their piece with the people that would be entitled to it, wouldn't, wouldn't they? You're just entitled to get your money back, then offset anything you'd be able to pay. So it looks to me like - that the defendants in this case have simply paid and bought their piece for any excess over what you might be, you might recover against them. It is -- am I missing that analysis somehow and this -

MS. KEENEY: No, I do not think you are, your Honor. But, but I think that to have this adjudicated in a simple fashion in one lawsuit, the plaintiffs need to be required to remain in this case. We got most of the relief that we needed from the Court of Appeals and I think that they intended to, to grant us the relief that we needed. They said, 'Yes we're entitled to intervene, your-- you don't need to have these plaintiffs in this case because you can pursue your relief against this estate itself to get that money back.' And we also do still have Scot - Scotsman and Nelms in this case. But what we are seeking to do is, is to require the plaintiffs to be here so that we can adjudicate whether or not we have to continue to make payments. It's one, it, it creates essentially a procedural mores where -

JUSTICE JOHNSON: Doesn't the statute simply give you the right to stop making payments?

MS. KEENEY: Well, we had a court order that ordered us to continue to do that.

JUSTICE JOHNSON: With that it's-- what happened to that in the court of appeals opinion?

MS. KEENEY: The court of appeals reversed it and remanded to have a determination as to how much should be-- basically to determine what the fair allocation would be. And I think most of, most of the allocation should go to the widow and the minor child because they were

totally dependent upon the deceased for support.

JUSTICE GREEN: Now that your-- that the court of appeals has reversed the denial of your intervention petition, can't you go back then at the trial court and sue your individual plaintiffs?

MS. KEENEY: We can and in fact, that's one of the problem is that not being able to -- allowing them to have the nonsuit has resulted in another lawsuit. It's actually, you know, in another county and that is pending, that's abated. And that really is the purpose of, of this appeal is to clarify what the procedure needs to be. The Employers Casualty versus Henagar (852 S.W.2d 655) decision out of the court of appeals, until this decision out of Eastland (192 S.W.3d 912) came down, was the law in this state which was that a, a claimant, such as Mrs. Ledbetter and the minor child, could not nonsuit their claims in an effort to circumvent the carrier's right of reimbursement and right of future credit.

JUSTICE GREEN: So you can bring them right back into the case? Can't you? Or not?

MS. KEENEY: I think that we could. I think that they should not be allowed to be dismissed because what happens is we end up with essentially procedural problems--

JUSTICE BRISTER: Bring, bringing them in doesn't help because they don't have any money.

MS. KEENEY: They don't have any -

JUSTICE BRISTER: It's all their relatives.

MS. KEENEY: Well, actually some it has, we believe its been distributed to them. We're not sure exactly where the money has gone at this moment.

JUSTICE BRISTER: But it was set up so they wouldn't have any money.

MS. KEENEY: It was set up certainly so that the minor child, who's the person we now have to pay all benefits to, would not receive any money until his majority, but it was given to the, to, to you know, to the mother as his guardian at that time. But the Henagar decision made it clear that, that parties could not do this and what happens is that to allow them to take nonsuits of this sort, encourages this type of attempt to circumvent the statute. And it -

JUSTICE BRISTER: If it works everybody will do it.

MS. KEENEY: Exactly, and it also basically spawns multiplicity of litigation where we have a lot of lawsuits. If they're not allowed to take the nonsuit, we keep it all in one lawsuit, we unravel it and we fix it and it will discourage plaintiffs from attempting to do this in the future.

JUSTICE BRISTER: And that will make comp rates go up line.

MS. KEENEY: I think it would help make them go down if it would, if it would clarify this -

JUSTICE BRISTER: If you lose, everybody does it their way, you have to file extra lawsuits in a comp rates go up.

MS. KEENEY: Exactly, and so I think that, that's why is important to keep these people in the lawsuit so that we won't have any question about the adjudication of the, of the subrogation rights. And I'll, if the Court has no more questions I'll sit down.

CHIEF JUSTICE JEFFERSON: No further questions. Thank you, Counsel. The Court is ready to hear argument from the respondents.

COURT ATTENDANT: Please the Court. Mr. Hall will present argument for the respondents.

ORAL ARGUMENT OF LANCE HALL ON BEHALF OF THE RESPONDENT

MR. HALL: May it please the Court. Your Honors, this, first let me say regarding, among other things, rates going up. This is an unusual case. Part of the reason it's unusual is the insurance company chose to do nothing and that is, they chose not to hire lawyers. Apparently -

JUSTICE BRISTER: Chose not to what?

MR. HALL: Hire lawyers, apparently, until the very end. They were involved in the case, investigation of the case from the start.

JUSTICE BRISTER: Why, why have two lawyers prosecute the plaintiff, one plaintiff's case against the defendants.

MR. HALL: I'm sorry I didn't -

JUSTICE BRISTER: Why, why have two sets of lawyers doing the same thing?

MR. HALL: They didn't have any sets of lawyers. They were.

JUSTICE BRISTER: I know, but the plaintiffs, the plaintiffs did. The guy, the family of the guy who died had lawyers who had every incentive to go after the defendants.

MR. HALL: Yes.

JUSTICE BRISTER: Why have an insurance company lawyer there looking over his shoulder other than to make, other than to make it more expensive?

MR. HALL: Well, for one thing to pursue their comp plan. They, they waited until the very day. The statement was made earlier that they didn't have the chance to litigate. They did have the chance to litigate. They had the chance to litigate that very day.

JUSTICE HECHT: Mr. Hall, there's nothing to litigate. They're entitled to the first money.

MR. HALL: Well, they are entitled to the first money Sir, but I believe the law is clear that if there is disagreement on how much that first money is, if it's not agreed, then, that has to be proven. The, the cases say --

JUSTICE HECHT: But you think it would be better for the subrogated comp carrier to get in the lawsuit early and start fussing with the plaintiffs over how much they are going to get.

MR. HALL: Well, I don't know how much fussing that would require, Sir.

JUSTICE BRISTER: It was required a lot in this case.

MR. HALL: Well, that's because they didn't prove it. They, they waited 'til the last minute and didn't prove it. For instance, you know the cases say, Diaz says, the cases I've cited, Diaz (750 S.W.2d 807), Lara (901 S.W.2d 635), those cases, say it has to be an arithmetic calculation. Now, in this case, they want to say over and over, they want to say we've proved it. They haven't. For one thing, I believe that six thousand is part of the twenty-seven thousand Let's go a step further. Whether that's true or not, let's go a step further. If you take what they tried to prove with their lawyer that day, is three hundred seventy-six dollars a week. If you calculate that out it comes to, if you take four weeks in the month it comes to fifteen hundred and something dollars. If you take four and a third, it comes to sixteen hundred and something dollars.

JUSTICE BRISTER: But you -

MR. HALL: On the other hand Sir, this is -

JUSTICE BRISTER: Let me-- very interesting but let me. Your-- you set this or, whoever set this settlement up, was there any purpose

other than make sure that the insurer got zero.

MR. HALL: Yes. That was, that, that had really nothing to do with it. The insurer was called and said come prove up your deal. What happened was -

JUSTICE BRISTER: No, no, no.

MR. HALL: As -

JUSTICE BRISTER: You're misunderstanding my question. The fella died, right?

MR. HALL: Right.

JUSTICE BRISTER: He had a wife and a minor child and we settled the case and they get zero.

MR. HALL: They did -

JUSTICE BRISTER: That's not, not normally the way people settle that case, and I'm trying to find out is the reason they got zero, the sole reason they got zero, is to make sure the folks at that table got zero.

MR. HALL: It has nothing to do with it.

JUSTICE BRISTER: Why did you set it up that way.

MR. HALL: The, the court of appeals' opinion makes some reference to four hundred and something thousand dollars by their calculation saved in taxes. In fact, it was a good deal more than that. The -- if that money goes to the adult kids, the minor child, the wife, it's taxable.

JUSTICE BRISTER: So it's to make sure the government and that the insurer got nothing.

MR. HALL: Well, I, I believe tax planning is part of our society, sir.

JUSTICE BRISTER: Well, there's no question a major part of this judgment was for the guy's wages. I mean he wasn't, I mean that's what it was, right? He didn't have a whole lot in medical expenses.

MR. HALL: No, he did not have medical expenses.

JUSTICE BRISTER: So the entire judgment was for future earnings which are supposed to be taxable, right?

MR. HALL: I don't agree that that was the entire judgment.

JUSTICE BRISTER: That was a major part.

MR. HALL: That's, you know -- that's, that's not the way it was structured and whether it would've been the major part or not I don't know.

JUSTICE BRISTER: I'm troubled about -

MR. HALL: If you're charge -

JUSTICE HECHT: - the nonsuiting when you've got a minor child. We've got a minor here and the next friend, and let's say it's a different case so its a paraplegic minor child who's been injured, can the next friend just come in and nonsuit when there's some evidence, let's say, that the next friend personally just got a million dollars from the defendants. A court would have to stop that, wouldn't they?

MR. HALL: Are, are you asking me should we rely on the trial courts to protect the children?

JUSTICE BRISTER: Your, your case is, you can nonsuit any time you want. And I'm just trying to posit a different case, not your case. A paraplegic injured minor child represented by parent next friend, there's evidence the parent took a million dollars personally, and now nonsuits the minor's claim. A trial judge would have to say no, wouldn't they?

MR. HALL: Are you, are you positing that the minor child gets nothing?

JUSTICE BRISTER: Yes, as nonsuit.

MR. HALL: And there's no, there's no provision for that child to go -

JUSTICE BRISTER: No settlement, no nothing.

MR. HALL: Well, I believe, I believe -

JUSTICE BRISTER: I just want my answer right to nonsuit, judge will have to stop that.

MR. HALL: I believe the trial court would be duty bound to stop that.

JUSTICE HECHT: So there is an exception to the absolute right to nonsuit and since a minor was involved here, trial judge should have thought about that, right?

MR. HALL: I'm sure he did and I'm sure that he tried, that he took whatever steps were necessary and did take whatever steps were necessary to make sure that that minor child was protected. The, the, the harm, there is no harm to, in this case to the insurance carrier. They did not prove to an arithmetic certainty anything. Nothing. They had a chance to prove it both with questions to the claimants, or plaintiffs as you wish to call them, and by what they presented as far as arithmetic certainty which Lara requires, which Diaz requires, which -- and in the case of an intervention which the EVR case (813 S.W.2d 552) requires. The arithmetic certainty in that case, it's not here. On the one hand, there's, other cases are, I believe Lara and I believe Diaz and, and for that matter Serrano (962 S.W.2d 536), and I'll tell you why I say Serrano in a second, that say it, it must be an amount. There are instances where, where somebody testified in one case approximately two hundred three dollars. Approximately cannot be calculated. It has to be exact amounts and if -

JUSTICE HECHT: And it were, if they had proved by an exact amount here would there have been harm?

MR. HALL: Sure.

JUSTICE HECHT: So that's the only thing that's missing, is how exact was it?

MR. HALL: As far as, as far as harm and the judgment for nothing, yes, they didn't prove it.

CHIEF JUSTICE JEFFERSON: Did they prove anything? A minimum?

MR. HALL: In my opinion, no.

CHIEF JUSTICE JEFFERSON: So there's no evidence whatsoever of the amount that they paid and benefits.

MR. HALL: Not as required by the law because it's got to be an arithmetic certainty. The testimony -

CHIEF JUSTICE JEFFERSON: Is there an arithmetic certainty of a minimum amount paid and benefits anywhere in the record?

MR. HALL: No. She said, approximately twelve hundred and fifty-eight dollars. The, the attorney said, three hundred seventy-six dollars but assume that three hundred seventy-six is accurate, there is absolutely nothing about how many weeks, so what do you multiply three seventy-six by?

JUSTICE BRISTER: Well -

MR. HALL: It's not there.

JUSTICE BRISTER: - as you said, they just intervened that day.

MR. HALL: That's correct.

JUSTICE BRISTER: The day they got kicked out. Normally, normally if you wanted to kick them out because they didn't prove it, you'd have to file a summary judgment, wouldn't you? Normally you can't just, the day somebody files a, a petition go to the judge, have a little quick hearing and dismiss it because they haven't proved their case, can you?

MR. HALL: They didn't have to intervene that day, they could have,

as I said earlier they, they could have intervened earlier and done all these things.

JUSTICE BRISTER: You don't have-- plaintiffs' attorneys don't have to file their car wreck cases the last day of a two-year limitations period. They always do and there's nothing wrong with doing that. So is there something that bars them, do they waive something by intervening before the judgment is sent.

MR. HALL: Do they waive something?

JUSTICE BRISTER: Right?

MR. HALL: No.

JUSTICE BRISTER: So then, don't they have a right before everything is dismissed to say, if you say we have no claim, file a summary judgment, which you didn't do.

MR. HALL: If -- do they waive anything, no. But do they gain some kind of advantage because they just filed it that day? Is the requirement of proof somehow less because they don't -- because they only required it that day. No Sir. They have to prove the same thing as everybody else.

JUSTICE BRISTER: To file an intervention, they have to do that?

MR. HALL: Yes, the EVR case is an intervention. In that case, the amount in question was not agreed upon and the intervenor was required to prove it or fail to recover. That's, that's in the case and it's also -

JUSTICE BRISTER: They're not, they're not here saying they had, they want us to order them to recover. They're just here saying we wanted not to be kicked out.

MR. HALL: They had every opportunity to plead and prove their case that day, they didn't do it.

JUSTICE JOHNSON: But how does that get their intervention stricken? I mean you might have a take nothing judgment, but how do you, how do you get stricken out of a case because you didn't prove it?

MR. HALL: That, your Honor, that's a hard question to answer for me.

JUSTICE JOHNSON: Well, let me ask you the, the other question we were asking opposing counsel here. Aren't they still, aren't they still entitled to maintain a lawsuit against the defendants? Have you prejudiced by the settlement that you -- regardless of how the money was allocated, regardless how that money was allocated, aren't they still entitled to go against the defendants? The defendants knew that they, that there was a comp carrier in there, and under the Texas Law, they are entitled to dollars under a statute, and yet the defendants went ahead and paid you and took a relief from you. Can your clients or could you release their, the comp carrier's claim?

MR. HALL: No.

JUSTICE JOHNSON: They were-- they had their own attorneys, independent representation, no one said they were released. So regardless of how that money was allocated to you, how have they been harmed?

MR. HALL: I believe they haven't. In fact the statutory, the statutory structure is such that they have the right to proceed on their own.

JUSTICE JOHNSON: So how do they get, how do they get to -- now, now, assuming that to be the case, they get to go against the defendants and the defendants get to pay again if they prove their case, and in the mean time, they don't want to pay your client, they don't want to pay the future weekly comp benefits. So that they have to -- is it your position they have keep paying those?

MR. HALL: It's my position they didn't prove it and they do.

JUSTICE JOHNSON: They have to keep paying them?

MR. HALL: Yes.

JUSTICE JOHNSON: All right. Now then, so if they recover, if they recover against the other defendant, do they get to keep all of that money, everything they, they have paid and the, they pay in the future up to that judgment? Is that your position? Can I get the million dollar judgment, and they paid, say, a hundred thousand dollars to your clients. They get a, they get a hundred thousand dollars from the defendants, is that correct?

MR. HALL: Yes.

JUSTICE JOHNSON: All right. Now then, what happens to the other nine hundred thousand dollars? Does your client get it or do they just get the offset that against the payments they make against your client, how does that work?

MR. HALL: I don't know if the exact word would be offset, but they would, it would -

JUSTICE JOHNSON: Under the statute -

MR. HALL: - It was certain -

JUSTICE JOHNSON: - doesn't it say offset? Doesn't it say offset?

MR. HALL: Well, I mean to-- Yes. The hundred thousand in your postured place would be offset -

JUSTICE JOHNSON: Okay.

MR. HALL: But I'm referring to the additional amounts. I don't know if the word would be offset, but certainly it would be the property of the two defendants rather than the Ledbetters.

JUSTICE JOHNSON: Okay. So how do they, well, how do they-- how does the comp carrier get out of having to pay the continuing comp to your clients then without your clients being in the lawsuits they contend. They have to go back through the commission? How do they get to offset that?

MR. HALL: Our opinion is it's res judicata?

JUSTICE JOHNSON: Okay, so your opinion is this, this judgment in fact does what they're complaining about -

MR. HALL: Between them -- between us and them.

JUSTICE JOHNSON: Their-- this judgment makes them you're, you're up here wanting the judgment to make them continue paying you in the, and your clients in the future then.

MR. HALL: That's correct. The burden-- in our opinion, the burden was on the comp carrier as a party asserting subrogation rights when there's not agreement on the amounts, the burden --

JUSTICE JOHNSON: Well, they knew how much, you knew how much they were paying every week. There's no question about that was there? Didn't your client testify to that?

MR. HALL: It wasn't shown. She said -- she -- no. Your Honor, in my opinion she didn't.

JUSTICE JOHNSON: She didn't say how much was being paid for it.

MR. HALL: She said approximately twelve hundred and fifty-eight dollars. The courts have held that that is not sufficient.

JUSTICE JOHNSON: But that's not in the past, that's in the future.

MR. HALL: Well, it was in the past and the future, the amount wouldn't change in that sense. She would be entitled, she said her and her son, I believe, that they would be entitled to the same amount because his wage rate wouldn't change. And like if, if, you know, if, if there was something, for instance, say it was at the upper limit and later it changed as an upper limit, and my view of the comp law is that whatever period of time it was when you were killed, it stays there.

JUSTICE JONSON: Well, let me ask you this questions then. Say, okay there is a judgment telling them to continue paying in the future?

MR. HALL: There is a judgment out of the trial court, yes, your Honor.

JUSTICE JOHNSON: Out of the trial court? Okay.

MR. HALL: But the, but the court of appeals reversed that and so in that sense there isn't judgment. It's not being paid right now. It's, it's a static amount.

JUSTICE HECHT: I'm a little unclear about your answers to my question and Justice Johnson's. I ask you if there had been proof by, to arithmetic certainty, would the carrier have been harmed by the way this was handled, and I thought you said yes.

MR. HALL: Yes.

JUSTICE HECHT: Justice Johnsons says, but if they can still get it from the defendants, is there any real harm, and I thought you said no. But isn't their harm because they don't get first money? Aren't they entitled to first money?

MR. HALL: Yes.

JUSTICE BRISTER: And if, if, if this works, won't everybody do this?

MR. HALL: If what works, your Honor?

JUSTICE BRISTER: If, if it works when you've received comp, that you sue the bad guys, and then you have them pay your relatives, then, in fact, comp carriers will never get their money back.

MR. HALL: They're not -- the comp carrier should not lose here because the nonsuit occurred. The comp carrier should lose here because they didn't plead and prove what they're entitled to.

JUSTICE BRISTER: The day they intervened.

MR. HALL: The day they intervened. They chose to do it all at once.

JUSTICE GREEN: That's because you objected, the trial counsel objected to their putting on proof.

MR. HALL: He did object but he did put on the proof.

JUSTICE GREEN: Well, an offer of proof after the objection was sustained.

MR. HALL: Well, no. He actually was entitled to show with Mrs. Ledbetter that amount about approximately and so on. He didn't get to go further, like on the pain and suffering and so on. But, but then he put on the bill with his testimony. If there are no other questions, your Honors, thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF MARY A. KEENEY ON BEHALF OF THE PETITIONER

MS. KEENEY: Plaintiff's -

JUSTICE HECHT: Did you prove, did you prove it?

MS. KEENEY: Did we prove it, yes, we did. But I, I think we also don't have to and that's what the court of appeals held and that's one of the -- basically, Texas Mutual walked into an ambush in the trial court. They were invited to this by the counsel for the plaintiffs and their interest was recognized when we got, when they got there. Plaintiffs' counsel essentially went on, set out to deprive Texas Mutual of any recovery at all and I think the record will reflect that.

JUSTICE MEDINA: Why is it that you don't have to prove your claim?

You just show up and say we paid this and your -- you think you are entitled to receive it because you say so?

MS. KEENEY: No. And, and we do, we did prove it. What happened was we thought okay, what, what happened was when we showed up, they moved to strike our intervention completely. And the trial court granted the, the striking, the motion to strike the intervention. And so what the court of appeals held, and we think correctly, is that you're out and if you are out we don't really need look your evidence. It's improper to have stricken your intervention. We're going to put you back in and we're going to remand so that you can look at the, the reasonableness of this settlement and whether it was properly allocated.

JUSTICE MEDINA: Did you prove your claim?

MS. KEENEY: We did over a lot of objection. What we managed to get into the record on cross-examination of Mrs. Ledbetter was that she was paid twelve hundred and fifty-eight dollars a month, she and her minor child both, for the fifteen months after her husband had died. And that, and that came out to just about twenty-eight thousand dollars -

JUSTICE MEDINA: And if you didn't -

MS. KEENEY: - We may not have proved up the cents -

JUSTICE MEDINA: And if you didn't prove up your claim you, you said you're still, you're entitled to relief? Because you said you don't have to prove up your claim.

MS. KEENEY: We're claiming that we were stricken from the case and if we're stricken from the case, the evidentiary hearing, it becomes irrelevant. And so therefore we need to be, be re-instated, our intervention is to be reinstated, and we need to have a remand for proper hearing. But we also had, as a matter of law, the continuing obligation to make future payments. And the court would not allow examination even of Mrs. Ledbetter regarding the fairness of the allocation. There wasn't any evidence in the record really that, that Mr. Ledbetter suffered, suffered from the electrocution. He died almost immediately and there was no testimony that would support allocating \$4.5 million to the estate. That was the other issue that we were trying to address in this hearing. And it was not a trial, it was a, hearing to determine the reasonableness of the settlement. And we think we put sufficient evidence in the record to show that this particular settlement that the trial court approved was not reasonable and the case needs to go back.

JUSTICE HECHT: Just out of curiosity, I thought I read on the briefs that the settlement was for \$4.5 million, a net of \$2,388,545 and 40 cents.

MS. KEENEY: Yes.

JUSTICE HECHT: Why the difference? Do you -- would the record reflect that -

MS. KEENEY: Attorney's fees and costs.

JUSTICE HECHT: So about half attorney fees?

MS. KEENEY: Yes, and your Honor, counsel made a comment that, that what they're trying to do was not to circumvent Texas Mutual's rights, but to save taxes and they say that the court of appeals noted that that's what they were doing. In fact, the court of appeals noted that the basic mess that was created in the trial court has probably resulted in almost half a million dollars in estate tax liability because they threw all of the money into the estate in a year when the estate tax exemption was only one million dollars. And I, I don't-- I'm not in the estate tax lawyer but the Eastland Court of Appeals footnote on that point appears to be correct. I don't see how you can put two and a half million dollars in an estate and avoid the estate tax. And,

and Justice Johnson, back to your point, because I don't feel that I answered your question very well, but I think you may have gotten your answer from my apponent. But I want to be clear is that, is that our rights to go against the other defendants, and to file second lawsuit against the Ledbetters as well, we are still harmed. We, we are not made whole by that. If we had the right to litigate an entire claim against Scotsman and Nelms -- litigation of third party liability claims is expensive, we're and, what we're entitled to, is the first money in the settlement of this case and its simply a matter of determining where the 4.5 million needs to go. It also -- to allow the Ledbetters to pull out in this way and to require, you know, further action against the Nelms and Scotsman would allow the Ledbetters to have a double recovery. And I think that as a matter of policy, that should not be allowed.

CHIEF JUSTICE JEFFERSON: In the suit against the Nelms and what was the other?

MS. KEENEY: Scotsman.

CHIEF JUSTICE JEFFERSON: Scotsman. Are you required to prove their liability or just your benefits?

MS. KEENEY: If we were, we were required to bring it an independent lawsuit --

CHIEF JUSTICE JEFFERSON: (inaudible) -

MS. KEENEY: -that, that regard to the settlement that they have with the Ledbetters, we would be you know, put to the same proof and we'd have to prove liability.

CHIEF JUSTICE JEFFERSON: And what, what if the jury says zero, then you're out, is that how it works?

MS. KEENEY: We wouldn't have a right as -- under, under that case. We think we would still have a conversion action with regard to the settlement funds in this. And that's the whole point is that we need to create a process and make it very clear, because this is a problem that occurs across the State. This is a common problem. It is, it is one of, I mean you know, of other cases that involve this, where plaintiffs and their counsel essentially, you know, they reach a settlement with the insure, with, with the third party defendants and they don't want to share, they don't want-- don't want to pay the workers' comp carriers. And we need a clear statement from this Court that that will not be tolerated and that the mechanisms and I, I think that the, the Henager case set up a mechanism that made it simple, made it clear, kept all the parties together. I think that's for the benefit of also Nelms and Scotsman that I, I understand that you know, what they did was improper. I think they were heavily pressured. It's obviously a very large settlement. I think, that they were some fear on their part and that's why they went ahead and settled. But I, I think if we have a system that ensures that the carrier will be reimbursed and we are entitled to wait, we don't have to intervene in these lawsuit we could have waited. We're not required to participate but that if we do we're going to be protected and, and the parties are going to have, be required to establish the proper allocation of the settlement. And if the Court doesn't have anymore questions I'll give back a minute.

CHIEF JUSTICE JEFFERSON: No further questions. So the cause will be submitted and the Court will take a brief recess.

COURT ATTENDANT: All rise.

2007 WL 5231247 (Tex.)

